

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 91-01
(April 29, 1991)

**Disqualification Requirements in Cases Where
Spouse Is on Prosecutor's Staff**

Issue

Must a superior court judge take recusal in a case where a defendant in a criminal case is also defendant in an unrelated criminal case in federal court where the spouse of the judge is a prosecutor employed by the U.S. Attorney's Office? This spouse is not involved in the prosecution of the defendant.

Answer: No

Discussion

The Code of Judicial Conduct, Canon 2, requires that a judge avoid impropriety and the appearance of impropriety in all activities. To that end, the judge's conduct must at all times aspire to a standard "that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3C(1) provides:

A judge should disqualify himself in a proceeding in which his partiality might reasonably be questioned, including, but not limited to instances where:

. . .

(d) he or his spouse . . .

(ii) is acting as a lawyer in the proceeding absent the consent of counsel;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

The judge's spouse is not an attorney of record in the proceeding before the court and, therefore, the situation does not fall within the specific proscription of Canon 3C(1)(d)(ii). Nor would it appear that the interest of the spouse is such that it could be substantially affected under (iii) in the outcome of the proceeding. This rationale is applied to lawyers in government service where compensation and clientele are set and the prestige of the office is not greatly impacted by results in particular cases. *Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984). There, the judge's spouse was employed by the District Attorney's office and assigned to the juvenile division exclusively in the district court. Judge Beckman was a judge in the county court and was scheduled to preside at the defendants trial in a misdemeanor matter.

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The Colorado Court of Appeals held that the spouse was not an attorney engaged in the defendant's case. However, the Court concluded that the circumstances were such as to create an appearance of impropriety in view of the close nature of the marriage relationship and the common perception that husbands and wives share confidences regarding their personal lives and employment. The Court concluded that the marriage relationship between a judge and a deputy district attorney in the same county was sufficient to provide grounds to call into question the judge's impartiality.

However, in *State v. Logan*, 236 Kan. 79, 689 P.2d 778 (1984), the Kansas Supreme Court held that the trial judge did not err in refusing to step down in a criminal action, although the judge's son was employed by the District Attorney's office which was prosecuting the defendant's case. The son was not involved in the prosecution. The Court held that the standard for the charge of lack of impartiality was to be grounded on facts that would create a reasonable doubt of impartiality in the mind of a reasonable person with knowledge of all the circumstances.

A fortiori, in the situation before us, where the spouse is not a member of the county attorney's office charged with prosecuting the defendant in the inquiring judge's court, we do not believe that an automatic recusal is called for to prevent compromising the appearance of integrity of the court. However, for the reasons given in *Smith v. Beckman* and in the interest of giving the highest consideration to any possibility that the facts may give rise to the appearance of impropriety, we believe the better course is that suggested by concurring Justice Miller in *State v. Logan*, that the trial judge state the situation for the record and offer recusal. See 689 P.2d at 785, 786.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2 and 3C(1)(d)(ii) (1985).

Other References

Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984)

State v. Logan, 236 Kan. 79, 689 P.2d 778 (1984)